concerned with undertaking to pay interest with effect from March 27, 1980. This letter also stated that the chargee's immediate attention would be greatly appreciated. The trial Judge found that from the terms of the letters the loan was urgently required by the chargor and was also satisfied that the amount of the loan was paid prior to and in anticipation of the execution of the Charge. The disbursement made was to enable the appellants to purchase the same land which became the subject of the Charge.

The directors of the appellants' company had also resolved that the directors be authorised to borrow the said sum of M$1.8 million on terms and conditions set out in the respondent bank's letter of offer dated February 25, 1980 ("BCWJ-4"). It was the term of the said letter of offer that the appellants were to provide the first charge of the said land as security for the loan.

On the other hand what the appellants were trying to persuade this court to hold was that the order of sale made by the trial Judge was wrong because the loan was not disbursed in accordance with the terms of the annexure to the Charge and therefore the loan was not secured by the Charge.

In our view the grounds of appeal are unconscionable and misconceived. The land C.T. 1478 Lot Nos. 499 and 656 was properly charged under the National Land Code. The Charge itself (pages 12, 13 and 14 of the appeal record) was executed in accordance with section 242 of the National Land Code by an instrument in Form 16A. The Charge expressly states that it was executed to secure the repayment to the chargee of the loan of M$1.8 million which sum was also acknowledged in the Charge itself to have been received by the appellants.

Section 340 of the National Land Code confers indefeasible title to the person or body in whose name any charge is for the time being registered and such title shall be defeasible only as provided under sub-section (2) of that section. See also *Tai Lee Finance Co. Sdn. Bhd.* v. *Official Assignee & Ors.*[1]

It would seem to us that the appellants chose to rely not on the Charge but on the annexure to the Charge which, it is true, provides as to the manner and conditions for the disbursement of the loan. In our view, however, clause 3.04 of the annexure merely imposes a duty on the bank to make the disbursement of the loan after the execution and presentation of the Charge. But this does not prevent the respondent bank from making disbursement before the execution of the Charge as done in this case with the understanding the money was urgently required for the purpose of purchasing the same land. It is to be noted also that the rate of interest payable was the same. The conditions precedent for disbursement under Article V of the annexure to the Charge would be relevant only where disbursement of the loan had not been made prior to the execution of the Charge.

In this case the Charge instrument clearly shows that disbursement of the sum of M$1.8 million had in fact been made since the appellants acknowledged the receipt of the same said sum in the Charge. It is against all conscience and logic to allow the appellants to say that no disbursement of the loan of M$1.8 million has been made by the respondent bank under the Charge and yet in the charging instrument itself the appellants acknowledged receipt of the sum. As the loan was disbursed pursuant to the appellants' application, they cannot be heard to say that the disbursement was not in accordance with the Charge.

It is our view that the arguments of the appellants are completely without merits. *Appeal dismissed with costs.*

Appeal dismissed.

Solicitors: *Ng Ek Tiong & Partners; Nik Hussain, Ibrahim & Abdullah.*

MICHAEL C. SOLLE v. UNITED MALAYAN BANKING CORPORATION

[F.C. (Salleh Abas C.J. (Malaya), Hashim Yeop A. Sani & Syed Agil Barakbah F. JJ.) January 11 & 23, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 213 of 1983]

Contract – Letter of undertaking – No breach – Bankruptcy proceedings.

In this case a consent judgement had been entered against the respondent and two others. A bankruptcy notice was caused to issue by the respondents. Subsequently the appellant managed to prevail on the bank to withdraw the bankruptcy proceeding against him upon the appellant delivering to the bank a letter of undertaking. The respondent bank later caused another bankruptcy notice to issue in another proceeding purporting to rely on the failure

to comply with the undertaking. The learned trial judge ruled that the respondent bank was not precluded from recommencing bankruptcy proceedings against the appellant. The appellant appealed.

Held: on the facts disclosed and on the language of the undertaking there had been no breach of the undertaking as a whole. Although there had been a breach in the repayment scheme, the remedy provided by the undertaking was to effect the transfer of the shares deposited by the appellant with the respondent to the respondent and this undertaking was complied with by the appellant. There was no provision in the undertaking which stated that the respondent bank was at liberty to revert to bankrupty proceedings despite the undertaking.

FEDERAL COURT.

Atma Singh Veriah for the appellant.
Khaw Chay Tee for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court) : This was an appeal against the ruling of the learned Judge that based on an undertaking executed by the appellant ("CBK 7") the respondent bank was not precluded from recommencing bankruptcy proceeding against the appellant. At the conclusion of the hearing of the appeal we decided to confine our decision only to the point concerning what proper construction ought to be given to the provision of the said undertaking.

The facts are straightforward and may be summarised as follows. A consent judgment for $100,244.53 was entered against one Michael C. Solle (the appellant) and two others. A bankruptcy notice was caused to issue by the respondent bank. Thereafter the appellant managed to prevail on the bank to withdraw the bankruptcy proceeding against him upon the appellant delivering to the bank a letter of undertaking as exhibited. The respondent bank later caused another bankruptcy notice to issue in another proceeding purporting to rely on the failure to comply with the undertaking. That proceeding resulted in the present appeal.

The appellant's contention was that the arrangement in the terms of the letter of undertaking was that he was to make a downpayment of $20,000/- followed by monthly instalments of $10,000/- *per mensem* until the whole debt was cleared and he was also to deposit with the bank his 40,000 shares in a company and to do everything necessary for the effectual transfer of those shares to the bank in the event of default with the repayment scheme. The trial judge held that the deposit of shares was meant to be a form of security for the fulfilment of the undertaking to make the payment of $20,000/- and the monthly instalments of $10,000/- and that the respondent bank had an option in their absolute discretion to either register themselves as owners of the shares or resort to other means of recovering the debts. In other words the respondent bank is not precluded from recommencing bankruptcy proceedings.

It is useful to examine the letter of undertaking which reads as follows:

"NOW IT IS HEREBY PROVIDED AS FOLLOWS:-

1. In consideration of your agreeing at my request to withhold bankruptcy proceedings against me, Michael Solle (NRIC BK 00072) of No. 22, Road 12/14, Petaling Jaya, Selangor, I hereby undertake to do as follows:-

   (a) To pay you the sum of $20,000/- (Ringgit Twenty Thousand only) by July 31, 1981.

   (b) To pay promptly to you the sum of $10,000/- (Ringgit Ten Thousand only) per month, the first of such payment commencing on August 10 1981, and thereafter the succeeding month until the whole of the judgment debt plus interest has been fully satisfied.

   (c) To deposit with you 40,000 shares in Mideast Development Sdn. Bhd. and to do everything necessary for the effectual transfer of such shares to you in the event of my default in compliance under this Letter of Undertaking.

2. In the event of my failure to comply with this said Letter of Undertaking, you shall forthwith revert with bankruptcy proceeding against me."

We are of the opinion that on the facts disclosed and on the language of the undertaking there has been no breach of the undertaking as a whole. There was breach in respect of the repayment scheme but there is complete compliance of Clause 1(c) of the undertaking. The language of Clause 1(c) of the undertaking is clear and that it is operative in the event of default in the repayment scheme.

The first limb of Clause 1(c) requires the appellant to deposit the 40,000 shares and the second limb of Clause 1(c) requires the appellant "to do everything necessary for the effectual transfer of such shares" in the event of default of the undertaking. Thus where there is a failure to comply with the repayment scheme the remedy provided by the undertaking is to effect the transfer of the shares to the respondent bank which was complied by the appellant.

The principles of construction to be applied to

the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

The language of Clause 2 of the undertaking is clear and straightforward, *i.e.*, only in the event of failure to comply with the undertaking should the bank revert to bankruptcy proceeding. There was no failure to comply with Clause 1(c). There is also no provision in the undertaking which states that the respondent bank is at liberty to revert to bankruptcy proceeding despite the undertaking.

Appeal allowed. Costs to appellant, deposit to be refunded.

Appeal allowed.

Solicitors : *Atma Singh Veriah & Co.; Allen & Gledhill.*

WEE TIANG YAP v. CHAN CHAN BROTHERS

[F.C. (Wan Suleiman, Seah & Hashim Yeop A. Sani F.JJ.) June 7, 1983 & January 27, 1984]

[Kota Bahru – Federal Court Civil Appeal No. 180 of 1982]

Landlord and Tenant – Notice to quit – Termination of tenancy – Whether tenant estopped from disputing title of landlord – Claim for double rent – Evidence Act, 1950, s. 116.

In this case one Wee Phor Tin, the father of the appellant, claimed vacant possession of premises in Kota Bahru from the respondents alleging that they were trespassers. The respondents were previously the tenants of the premises but the said Wee Phor Tin had issued a notice to quit to the respondents, the notice expiring on March 1, 1976. It subsequently appeared that Wee Phor Tin was no longer the registered owner of the premises at the date of the filing of the writ as he had transferred it to his son, the appellant. It was also agreed that the respondents had been paying rent to Wee Phor Tin right up to August 1979. Before judgment Wee Phor Tin died and the appellant continued the action as representative of his estate. The learned trial judge held that on the death of a temporary occupation landowner his estate had no right of any kind to the land. He also held that section 116 of the Evidence Ordinance cannot prevent a tenant from contending that neither the deceased nor the widow had any title to the land. The learned judge therefore dismissed the claim and ordered that the sum of $16,800/– be paid to the respondents under the counterclaim. The appellant appealed.

Held. (1) the respondents are estopped from challenging the appellant's title;

(2) as the respondents had wilfully remained on the premises after the expiry of the period of notice, the appellant was entitled to obtain damages for trespass in the form of double rent.

Cases referred to:

(1) *Fatimah* v. *Moideen Kutty* [1960] 1 M.L.J. 72.
(2) *Cheok Lek San* v. *Yong Kam Chin* [1970] 2 M.L.J. 179.
(3) *Serjeant* v. *Nash, Field & Co. and Another* [1903] 2 K.B. 304.
(4) *Morton* v. *Woods* (1869) L.R. 4 Q.B. 293, 304.
(5) *Krishna Sreedhara Panicka* v. *Chiam Soh Yong Realty Co Ltd* [1983] 1 M.L.J. 65.
(6) *Crock* v. *Whitbread* 88 L.J. K.B. 959.
(7) *Krishna Prosad* v. *Baraboni Coal Concern* A.I.R. 1937 P.C. 251.
(8) *Singma Sawmill Co. Sdn. Bhd.* v. *Asian Holdings Industrialised Buildings Sdn. Bhd.* [1980] 1 M.L.J. 21, 24.
(9) *B. Kunwar* v. *D. Ranjit Singh* A.I.R. 1915 P.C. 96.

FEDERAL COURT.

C. Jagathesan for the appellant.
S.E. Rajah for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J.: In the trial court one Wee Phor Tin *alias* Wee Hian Thin, father of the present appellant, sued the present respondents for vacant possession of premises No. 3599, Jalan Ismail, Kota Bahru, alleging that they were trespassers. The respondents were previously tenants of the aforementioned Wee Phor Tin who on December 29, 1975 issued a notice to quit to the respondents, the notice expiring on March 1, 1976. In his pleading Wee Phor Tin alleged that having received the notice, the respondents continued to hold over as trespassers.

The respondents denied that they were trespassers but alleged that they were tenants of the premises for a term of years by virtue of an agreement, and counter-claimed for specific performance of that agreement. In his reply Wee Phor Tin denied the existence of such an agreement and pleaded that the respondents were at all material times his monthly tenants. Later the statement of claim was amended, it being admitted that there was an agreement in writing between the parties, "purporting to be a lease for